STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2012
v	No. 304350 Kent Circuit Court
WALTER LEE GILLEN, Defendant-Appellant.	LC No. 10-007885-FC

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a). Defendant appeals as of right. We affirm.

The incidents in this case occurred roughly between June 2009 and July 2010. B.R. turned 11 during that time period. A.R. turned 13 in June 2010. Defendant was friends with the mother of the victims. B.R. testified to multiple acts of penetration by defendant. A.R. also testified that defendant engaged in acts of penetration with her. Both girls were interviewed by a medical social worker and Detective Kelli Braate and the interviews were largely consistent with their testimony. Both girls were also examined by Dr. Cheryl Ann Tamburello. The physical examinations were normal, but Dr. Tamburello diagnosed both girls with "probable pediatric sexual abuse with a normal exam." If Dr. Tamburello had not known of the allegations, she would not have suspected abuse and the diagnoses would have been "normal." Defendant's interview with Detective Braate was played for the jury. In it he indicated there was sexual contact between himself and the girls and that at one point B.R.'s mouth was on his penis. Defendant was convicted of one count of first-degree CSC involving conduct with B.R.

During trial, defendant objected to the trial court's exclusion of a note written by A.R. in March 2010. Part of the note appeared to be written by A.R. and part by a boy. The note is sexual in nature and references a request for the victim to pull down her pants and her reply, inviting sexual acts. Defendant sought to have the note admitted to show that the victims were over-sexualized and knew a lot about sex.

On appeal, defendant first argues the trial court erred by excluding the note from evidence. A trial court's decision to preclude evidence under the rape shield statute is reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). This issue was preserved as to defendant's claim of a violation of his constitutional right to present a

defense and is reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). The issue was not preserved on the basis of defendant's claim of a violation of his right of confrontation and that argument is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The rape shield statute generally excludes evidence of the victim's sexual conduct with people other than defendant because the Legislature has determined that, in most cases, that evidence is irrelevant. *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982); MCL 750.520j. As to evidence to show a victim's knowledge, "information concerning the victim's past sexual experience is clearly inadmissible when offered to explain her familiarity with sexual matters in a manner not inculpatory of defendant." *People v Byrne*, 199 Mich App 674, 678; 502 NW2d 386 (1993) (citation omitted). Thus, the evidentiary decision to exclude the evidence was not an abuse of discretion.

With respect to defendant's claimed deprivation of his right to present a defense, "[t]he right to present a defense is a fundamental element of due process . . ." *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006), cert den 549 US 1133; 127 S Ct 976; 166 L Ed 2d 740 (2007) (quotation omitted). At a minimum, "criminal defendants have the right to . . . put before a jury evidence that might influence the determination of guilt." *Id.* at 460, quoting *Pennsylvania v Ritchie*, 480 US 39, 56; 107 S Ct 989; 94 L Ed 2d 40 (1987). The right to present a defense is not absolute, however, and may "bow to accommodate other legitimate interests in the criminal trial process." *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008) (quotation omitted).

In this case, defendant argues the note should have been admitted to show A.R. could have knowledge of sexual acts and when the note was excluded defendant could not present an explanation as to how A.R. had this knowledge. However, evidence to show a young victim's sexual knowledge is typically excluded because it is minimally relevant and the potential of prejudice is great; young victims are among those the statute intends to protect; and there are other methods for counsel to inquire of victim's knowledge. *Arenda*, 416 Mich at 12-13. The note in this case was minimally relevant to defendant's defense because it did not involve defendant, his culpability, or his interactions with either B.R. or A.R. And, it was written during the time frame defendant was allegedly engaging in sexual contact with the victims. On the record before this Court, given the minimal relevance of the note and its highly prejudicial nature, the right to present a defense should bow to accommodate the legitimate interests of the rape shield statute. *Unger*, 278 Mich App at 250. Defendant was not denied the right to present a defense.

As to defendant's right of confrontation, the right of confrontation, which includes the right of cross-examination, "helps assure the accuracy of the truth-determining process." *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973) (internal quotation omitted). Like the right to present a defense, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* (citation omitted). There was no plain error in excluding the note. *Arenda*, 416 Mich at 12-13; MCL 750.520j. Even if there was error, it did not affect the outcome of the trial because defendant was acquitted on the charges concerning A.R. Further, the note was minimally relevant and defendant cross-examined A.R. and B.R.

There was substantial evidence against defendant because the testimony of both B.R. and A.R. described his conduct, to a significant extent their testimony was consistent with their conversations with the social worker and Detective Braate, and defendant's recorded statements established that there was sexual contact and that B.R. put her mouth on his penis. Defendant was convicted for one act of first-degree CSC for conduct engaged in with B.R. Defendant has not established excluding the note was plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

Next, defendant argues Dr. Tamburello's testimony that B.R. and A.R. had "probable pediatric sexual abuse with a normal exam" was inadmissible. This unpreserved issue is reviewed for plain error affecting substantial rights. *Id.* In sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), mod 450 Mich 1212 (1995). An expert opinion based on the emotional state of and the history given by the victim and not based on "any findings within the realm of [the expert's] medical capabilities of expertise" is not admissible. *People v Smith*, 425 Mich 98, 112; 387 NW2d 814 (1986).

Dr. Tamburello's diagnosis was based solely on what she was told by the children and not the medical examinations. Because Dr. Tamburello's diagnosis was not based on "any findings within the realm of [her] medical capabilities of expertise" her testimony constituted improper vouching for the credibility of B.R. and A.R. *Id.* Thus, admission of this portion of her testimony was plain error. *Peterson*, 450 Mich at 352. However, this error did not affect defendant's substantial rights. Defense counsel emphasized on cross-examination that the diagnosis was based on what the girls said. B.R. and A.R. testified and their testimony did not have to be corroborated. MCL 750.520h. The trial court instructed the jury that it did not have to believe the expert's opinion and they should think about the facts given for the opinion. Finally, defendant indicated in his interview that there was sexual contact between him and the girls and that B.R.'s mouth was on his penis. With this substantial evidence, defendant cannot show that even if Dr. Tamburello's expert testimony was inadmissible and plain error, that it affected the outcome of the trial. *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra